

Ken

RECEIVED  
APR 01 2003  
D.N.R.C.

NANCY SWEENEY  
CLERK-DISTRICT COURT

MAR 28 1 43 PM '03

FILED BY JAMIE DZEL  
DEPUTY

COPY

MONTANA FIRST JUDICIAL DISTRICT COURT  
COUNTY OF LEWIS AND CLARK

\*\*\*\*\*  
MONTANA ENVIRONMENTAL INFORMATION )  
CENTER, and DAN EDENS, )  
Plaintiffs, )  
vs. )  
MONTANA DEPARTMENT OF NATURAL )  
RESOURCES AND CONSERVATION, and )  
UDELL SHARP, )  
Defendants. )  
\*\*\*\*\*

Cause No. CDV-2001-309

MEMORANDUM AND ORDER

Before the Court are:

- 1) the petition of Dan Edens for judicial review of the final order of the Department of Natural Resources and Conservation (DNRC) granting Defendant Udell Sharp a beneficial water use permit;
- 2) DNRC's motion to strike; and
- 3) the motion of Edens and the Montana

1 Environmental Information Center (MEIC) to reconsider the  
2 Court's Order entered September 5, 2001.

3 The matters have been submitted on briefs and are  
4 ready for decision.

5 BACKGROUND

6 On March 14, 1997, Sharp applied for a groundwater  
7 permit for sprinkler irrigation of 39 acres he owns in the  
8 Helena valley. An environmental assessment (EA) was done by  
9 DNRC on August 19, 1997.

10 Edens and nine others filed objections to the  
11 application. Sharp's well is located close to Ten Mile Creek.  
12 Edens has two surface water rights from Ten Mile Creek,  
13 downstream from Sharp's well.

14 A contested hearing was held March 5, 1999; however,  
15 the hearing officer did not issue a proposal for decision at  
16 that time. Rather, on July 6, 1999, DNRC issued an interim  
17 permit to Sharp which allowed him to appropriate water for  
18 irrigating the acreage. The interim permit was good until  
19 September 30, 1999. It required Sharp to perform a 24-hour  
20 aquifer test. The test was performed on September 12, 1999.  
21 An additional hearing was held February 16, 2000, at which  
22 Edens had the opportunity to cross-examine Sharp's expert and  
23 to present evidence on the results of the pump test.

24 On July 10, 2000, the hearing officer issued her  
25 proposal for decision in which she concluded that Sharp had met

1 all the criteria for the issuance of a beneficial water use  
2 permit and that Sharp should be issued a permit subject to the  
3 certain conditions.

4 MEIC was not a party to the administrative  
5 proceeding. However, on July 31, 2000, Jim Jensen, MEIC's  
6 executive director, wrote Jack Stults, the administrator of  
7 DNRC's water resources division, complaining about the adequacy  
8 of the EA. On August 9, 2000, Stults responded to Jensen's  
9 letter. In his response, he stated that the Department was  
10 revisiting the environmental assessments on pending  
11 applications and that the Sharp application would be reviewed  
12 using the new guidelines. The second EA on the Sharp  
13 application was done September 15, 2000. On April 13, 2001,  
14 Stults issued the final order which granted Sharp a beneficial  
15 water use permit subject to certain conditions. This action  
16 followed.

17 By Memorandum and Order entered September 5, 2001,  
18 the Court granted the Defendants' motion to dismiss MEIC's  
19 petition for judicial review. The Court also granted without  
20 prejudice Defendants' motion to dismiss the Plaintiffs'  
21 complaint for declaratory and injunctive relief.

22 **Motion to Strike**

23 DNRC has moved to strike Exhibit 1 from Plaintiffs'  
24 opening brief and references in the brief to articles from the  
25 Helena Independent Record on the grounds that neither the

1 exhibit nor the articles are a part of the administrative  
2 record. Section 2-4-704(1), MCA, provides that judicial review  
3 of a contested case shall be confined to the record. In a case  
4 where the appellant had attached materials to his brief, the  
5 supreme court stated: "It is axiomatic that this Court will  
6 not consider evidence not contained in the record on appeal."  
7 Johnson v. Killingsworth, 271 Mont. 1, 3, 894 P.2d 272, 273  
8 (1995). See also Frank v. Harding, 1998 MT 215, 290 Mont. 448,  
9 965 P.2d 254.

10 Edens claims the material is offered to show DNRC did  
11 not consider all the relevant information in making its  
12 decision. He cites Meeks v. DNRC, 1998 MT 36, 292 Mont. 317,  
13 971 P.2d 1223, as a case where a district court received and  
14 considered extra record material in a judicial review  
15 proceeding. Meeks, however, is distinguishable. In Meeks, the  
16 district court had allowed Meeks to depose the three DNRC  
17 employees who had made the underlying decision for DNRC in  
18 order to clarifying how they had arrived at their decision.  
19 Those employees had not testified in the administrative  
20 proceeding and, therefore, Meeks had not had the opportunity to  
21 cross-examine them.

22 Edens also cites Skyline Sportsmen's Ass'n v. Board  
23 of Land Comm'rs, 286 Mont. 108, 951 P.2d 29 (1997), as  
24 authority for the Court to consider extra record facts. That  
25 case involved the review of an informal administrative

1 decision, not judicial review of a final decision in a  
2 contested case, and it is not applicable here.

3 Edens was represented by counsel at the  
4 administrative hearing. He certainly could have offered the  
5 materials at the hearing but did not do so, and it is not  
6 appropriate for him to submit the materials as part of his  
7 argument for judicial review. Therefore, the Court concludes  
8 that the State's motion to strike should be granted.

9 Judicial Review

10 STANDARD

11 A district court review of an administrative agency's  
12 order is governed by the Montana Administrative Procedure Act.  
13 The standard of review for an agency decision is set forth in  
14 Section 2-4-704(2), MCA, which provides:

15 The court may not substitute its judgment  
16 for that of the agency as to the weight of the  
17 evidence on questions of fact. The court may affirm  
18 the decision of the agency or remand the case for  
further proceedings. The court may reverse or modify  
the decision if substantial rights of the appellant  
have been prejudiced because:

19 (a) the administrative findings,  
20 inferences, conclusions, or decisions are:

21 (i) in violation of constitutional or  
statutory provisions;

22 (ii) in excess of the statutory  
authority of the agency;

23 (iii) made upon unlawful procedure;

24 (iv) affected by other error of law;

25 (v) clearly erroneous in view of  
the reliable, probative, and substantial  
evidence on the whole record;

(vi) arbitrary or capricious or  
characterized by abuse of discretion or

1 clearly unwarranted exercise of discretion;  
2 or

3 (b) findings of fact, upon issues  
4 essential to the decision, were not made  
5 although requested.

6 The Montana Supreme Court has adopted a three-part  
7 test to determine if a finding is clearly erroneous. Weitz v.  
8 Montana Dep't of Natural Res. & Conservation, 284 Mont. 130, 943  
9 P.2d 990 (1997). First, the Court is to review the record to  
10 see if the findings are supported by substantial evidence.  
11 Second, if the findings are supported by substantial evidence,  
12 the Court is to determine whether the agency misapprehended the  
13 effect of the evidence. Third, even if substantial evidence  
14 exists and the effect of the evidence has not been  
15 misapprehended, the Court can still determine that a finding is  
16 clearly erroneous "when, although there is evidence to support  
17 it, a review of the record leaves the court with the definite  
18 and firm conviction that a mistake has been committed." Weitz,  
19 at 133-34, 943 P.2d at 992. Conclusions of law, on the other  
20 hand, are reviewed to determine if the agency's interpretation  
21 of the law is correct. Steer, Inc. v. Dep't of Revenue, 245  
22 Mont. 470, 474, 803 P.2d 601, 603 (1990).

#### 23 DISCUSSION

24 Section 85-2-311, MCA, provides that DNRC shall issue  
25 a permit if the applicant proves by a preponderance of evidence  
that certain criteria are met. Among other things, the  
applicant must show that the water is physically available and

1 that the water rights of a prior appropriator will not be  
2 adversely affected. The hearing examiner found that Sharp had  
3 proved by a preponderance of the evidence that the statutory  
4 criteria had been met. Edens was the only objector who filed  
5 exceptions to the hearing examiner's proposal for decision.  
6 After reviewing the record, Stults determined that the evidence  
7 supported the hearing examiner's findings that the statutory  
8 criteria had been met.

9 Edens contends Sharp failed to establish that the  
10 water was physically and legally available. He also argues  
11 that there were procedural flaws which require returning the  
12 case to DNRC because Sharp failed to strictly adhere to the  
13 interim permit order and because the proposal for decision was  
14 issued before the EA was completed.

15 Sharp was issued an interim permit that allowed him  
16 to irrigate the land during the summer of 1999. The final  
17 order stated that Sharp irrigated the land. That is not  
18 correct as he did not irrigate. However, he was not required  
19 to irrigate.

20 Although Sharp did not irrigate the land in 1999, he  
21 was required to conduct a 24-hour pump test, which he did.  
22 After the results of the tests were submitted, a hearing was  
23 held at which Edens had the opportunity to cross-examine Sharp  
24 and his hydrologist and to present further evidence.

25 Edens argues that the testimony of Vivian Drake, his

1 expert, and Jim Beck, a DNRC employee, provides substantial  
2 evidence that the findings and conclusions are not supported by  
3 the record. This, however, was a contested hearing and Sharp  
4 presented testimony and evidence that the water was available  
5 and that Edens' water rights would not be adversely affected if  
6 his application was granted. After considering all the  
7 evidence, the hearing examiner determined that Sharp had proved  
8 that the water was physically available and that granting him a  
9 permit would not adversely affect the water rights of prior  
10 appropriators. Her findings are supported by substantial  
11 evidence in the record.

12 When the hearing examiner issued her proposal for  
13 decision, the initial EA had been prepared but the second had  
14 not. The second EA was prepared before the final order was  
15 issued. It was determined that the surface water in Ten Mile  
16 Creek was not connected to the ground water Sharp was pumping.  
17 That determination is supported by the record.

18 For the foregoing reasons, the Court concludes that  
19 the final order should be affirmed.

20 **Motion for Reconsideration**

21 Plaintiffs have asked the Court to reconsider that  
22 portion of the Order entered September 5, 2001, which granted  
23 Defendants' motion to dismiss Plaintiffs' complaint for  
24 declaratory and injunctive relief. Having considered the  
25 arguments presented, the Court concludes that the motion for



1 reconsideration should be denied.

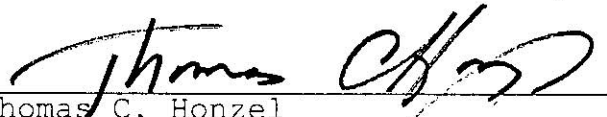
2 NOW, THEREFORE, IT IS ORDERED:

3 1. DNRC's motion to strike IS GRANTED.

4 2. The final order entered by DNRC on April 13,  
5 2001, IS AFFIRMED.

6 3. Plaintiffs' motion for reconsideration IS  
7 DENIED.

8 DATED this 28<sup>th</sup> day of March, 2003.

9  
10   
11 Thomas C. Honzel  
12 District Court Judge

13 pc: Brenda Lindlief Hall/David K. W. Wilson, Jr.  
14 Tim D. Hall  
15 Steven T. Wade

16 MEIC vs DNRC#1-m&o

17 k  
18  
19  
20  
21  
22  
23  
24  
25

Jack Stults  
Curt Martin  
Kim Overcast  
Terri McLaughlin  
Jim Beck

CDV 31.000

FILED

MONTANA FIRST JUDICIAL DISTRICT COURT  
COUNTY OF LEWIS AND CLARK

\*\*\*\*\*  
MONTANA ENVIRONMENTAL INFORMATION )  
CENTER, and DAN EDENS, )  
Plaintiffs, )  
vs. )  
MONTANA DEPARTMENT OF NATURAL )  
RESOURCES AND CONSERVATION, )  
and UDELL SHARP, )  
Defendants. )  
\*\*\*\*\*

Cause No. CDV-2001-309

MEMORANDUM AND ORDER

Before the Court are:

1. The motion of Defendants Department of Natural Resources and Conservation (DNRC) and Udell Sharp to dismiss the petition of Plaintiff Montana Environmental Information Center (MEIC) for judicial review;
2. Defendants' motion to dismiss Plaintiffs' complaint and demand for declaratory and injunctive relief; and
3. Sharp's motion to limit the scope of the petition

1 of Plaintiff Dan Edens for judicial review.

2 The motions have been submitted on briefs and are ready for  
3 decision.

4 **I. MEIC's PETITION FOR JUDICIAL REVIEW**

5 This action arises out of DNRC's decision to grant  
6 Sharp a water use permit for the withdrawal of groundwater for  
7 the irrigation of hay land in the north Helena Valley. DNRC's  
8 decision followed a contested-case hearing. The final order was  
9 entered April 13, 2001. MEIC was not a party to the  
10 administrative proceeding.

11 DNRC and Sharp argue that because MEIC was not a  
12 party to the administrative proceeding, it did not exhaust its  
13 administrative remedies and cannot be aggrieved by DNRC's  
14 final decision to issue the water use permit. They contend,  
15 therefore, that MEIC is not entitled to judicial review.

16 The Montana Administrative Procedure Act (MAPA)  
17 provides:

18 A person who has exhausted all administra-  
19 tive remedies available within the agency and who is  
20 aggrieved by a final decision in a contested case is  
entitled to judicial review under this chapter.

Section 2-4-702(1)(a), MCA.

21 The Montana Water Use Act provides the opportunity  
22 for certain persons to object to water use permit applications.  
23 Section 85-2-308, MCA, states in relevant part:

24 (1)(a) An objection to an application for  
25 a permit must be filed by the date specified by the

1 department under 85-2-307(2).

2 . . . . .

3 (3) A person has standing to file an  
4 objection under this section if the property, water  
5 rights, or interests of the objector would be adversely  
6 affected by the proposed appropriation.

6 . . . . .

7 (5) An objector to an application under  
8 this chapter shall file a correct and complete  
9 objection on a form prescribed by the department within  
10 the time period stated on the public notice associated  
11 with the application. The department shall notify  
12 the objector of any defects in an objection. An  
13 objection not corrected or completed within 15 days  
14 from the date of notification of the defects is  
15 terminated.

16 (6) An objection is valid if the objector  
17 has standing pursuant to subsection (3), has filed a  
18 correct and complete objection within the prescribed  
19 time period, and has stated the applicable information  
20 required under subsection (1), (2), or (4).

21 If an administrative remedy is provided by statute,  
22 that relief must be sought from the administrative body and the  
23 statutory remedy exhausted before relief can be obtained by  
24 judicial review. Barnicoat v. Comm'r of Dep't of Labor and  
25 Indus., 201 Mont. 221, 653 P.2d 498 (1982).

Here, an administrative remedy has been provided by statute but MEIC did not participate in that process. Moreover, MEIC has not argued against dismissal of this claim in its brief. Therefore, in accordance with Section 2-4-702(1)(a) MCA, MEIC is precluded from bringing a petition for judicial review of DNRC's decision to issue the permit.

1           **II. COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

2           Defendants claim that MEIC and Edens have improperly  
3 combined an action for declaratory and injunctive relief with a  
4 petition for judicial review.

5           MAPA requires that judicial review be limited to the  
6 administrative record. Section 2-4-704, MCA. Only upon  
7 application to and leave from the court may a party present  
8 additional evidence upon judicial review. Section 2-4-703, MCA.  
9 In order to grant injunctive relief, a hearing must be held.  
10 Section 27-19-301, MCA. If the court were to hold such a  
11 hearing, it is probable that evidence not contained in the  
12 administrative record would be submitted.

13           The Montana Supreme Court has not faced this issue.  
14 DNRC cites a minute entry dated May 5, 1993, in which Montana  
15 First Judicial District Judge McCarter denied the motion of the  
16 Flathead Tribes for a temporary restraining order and preliminary  
17 injunction. The minute entry, however, does not state any  
18 reasons for Judge McCarter's decision.

19           DNRC also refers to other courts which have dis-  
20 tinguished between the appellate function of a court in a  
21 petition for judicial review compared to the original  
22 jurisdiction of a court when injunctive relief is sought. DNRC  
23 cites Deffenbaugh Industries, Inc. v. Potts, 802 S.W.2d 520,  
24 1990 Mo. App. LEXIS 964. There, a municipality denied an  
25 application for a special use permit to operate a landfill.

1 Appellant filed a petition for judicial review along with two  
2 separate counts for declaratory judgment. The appeals court  
3 held that in a statutory proceeding for judicial review of  
4 a final administrative decision, pleadings for declaratory  
5 judgment and injunction are anomalous. The court dismissed  
6 those pleadings.

7 Here, MEIC and Edens are asking the Court to commingle  
8 its appellate and original jurisdiction functions. Those two  
9 actions should remain separate. Therefore, Defendants' motion  
10 to dismiss Plaintiffs' complaint for declaratory and injunctive  
11 relief should be granted.

12 **III. SHARP'S MOTION TO LIMIT SCOPE OF JUDICIAL REVIEW**

13 Sharp has moved the Court to dismiss those parts of  
14 Eden's petition for judicial review that pertain to alleged  
15 impacts on anything other than Eden's surface water right. That  
16 issue should not be addressed on a motion to dismiss. Rather,  
17 it more appropriately should be addressed in the petition for  
18 judicial review.

19 For the foregoing reasons,

20 **IT IS ORDERED:**

21 1. Defendants' motion to dismiss MEIC's petition for  
22 judicial review **IS GRANTED**.

23 2. Defendants' motion to dismiss Plaintiffs'  
24 complaint for declaratory and injunctive relief **IS GRANTED**  
25 without prejudice.

3. The following schedule **SHALL CONTROL** Edens' petition for judicial review: (a) Edens shall file his opening brief on or before September 28, 2001; (b) Defendants shall file their answer briefs on or before October 19, 2001; (c) Edens shall file his reply brief on or before October 30, 2001; and (d) Oral argument will be scheduled at the request of any party.

DATED this 5<sup>th</sup> day of September, 2001.

Thomas C. Honzel  
District Court Judge

pc: Brenda Lindlief Hall  
Tim D. Hall/Fred Robinson  
Steve Wade/Jeff Jaraczski

MEIC.m&amp;o

 $k$